(2)

No. 05-1368

9-2006

IN THE

Supreme Court of the United States

HAWTHORNE LAND COMPANY; HUGH A. HAWTHORNE FAMILY CLASS TRUST, BANK ONE TRUST COMPANY, NA,

Petitioners,

v.

OCCIDENTAL CHEMICAL CORPORATION and TEXAS BRINE COMPANY, LLC, Successor in Interest to Texas Brine Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to justify an exercise of this Court's supervisory jurisdiction when the U.S. Fifth Circuit Court of Appeals' opinion does not conflict with a decision of this Court or any court of appeals, and the decision does not involve an important federal question that has not been settled by this Court? The basis of Petitioners' request for certiorari review of the Fifth Circuit's opinion is simply an alleged misapplication of the law of joinder and summary judgment.

STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding below appear in the caption of this case. Pursuant to Rule 29.6 of this Court, Occidental Chemical Corporation states that it is an indirect wholly-owned subsidiary of Occidental Petroleum Corporation.

No publicly-held corporation owns 10 percent or greater interest in Texas Brine Company, L.L.C., successor in interest of Texas Brine Corporation

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ADDITIONAL STATUTORY PROVISION INVOLVED

Federal Rules of Civil Procedure 16(b)

Rule 16. Pretrial Conferences; Scheduling; Management

> **(b) Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time
>
> > (1) to join other parties and to amend the pleadings;
> >
> > (2) to file motions; and
> >
> > (3) to complete discovery.
>
> The scheduling order may also include
>
> > (4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(6) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

SUMMARY OF THE REASONS TO DENY THE PETITION

A writ of certiorari to review the November 15, 2005, ruling of the U.S. Fifth Circuit Court of Appeal is not warranted in this case, and the writ application should be denied. The sole basis upon which review by this Court is sought is the alleged misapplication of a properly stated rule of law and erroneous findings of facts by the lower courts. Such criteria are rarely considered appropriate for the exercise of this Court's authority. Petitioners argue that the lower courts misapplied the law of joinder of necessary and indispensable parties by proceeding in this matter without joining a co-owner of immovable property as a party in this proceeding which involves a claim for damages to jointly owned property. Pet. at 6. The co-owner settled any potential dispute with the defendants. Also, Petitioners contend the circuit court was confused about the facts in granting a

summary dismissal of this action based on prescription. Pet. at 13. Neither of these considerations demonstrates that the Petition for Writ of Certiorari satisfies the criteria governing review on certiorari. *See* Sup. Ct. R. 10 (a)-(c). Accordingly, the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Hawthorne Land Company, ("HLC"), The Hugh A. Hawthorne Family Class Trust, Bank One Trust Company, N.A., Trustee ("Hawthorne Family Class Trust" and collectively, "The Hawthornes") and Nire Inc., ("Nire") are all co-owners of immovable property, 17,350 acres south of Donaldsonville, Louisiana, located in the swamps of St. James and Assumption Parishes. This property is subject to numerous right of way grants, one of which permits Occidental Chemical Company ("Occidental") to operate a pipeline through the property to transport a concentrated sodium chloride solution ("brine"), from the salt domes of Grand Bayou, Louisiana, to Occidental's distribution plant some 42 miles away in Taft, Louisiana. This pipeline is referred to as the Oxy-Taft pipeline.

Between 1985 and 1987, the Oxy-Taft pipeline developed leaks. In February of 2001, Hawthorne Land Company instituted this action in the 23rd Judicial District Court for the State of Louisiana claiming these leaks had caused property damage. Hawthorne Land Company sought damages from Occidental and the then operator of the pipeline, Texas Brine Company, L.L.C., (formerly, Texas Brine Corporation), along with a host of other entities involved in the repair of the pipeline, seeking remediation and restoration of the

property.[1] Neither the Hawthorne Family Class Trust, nor Nire, co-owners of the property was originally joined in this action as party plaintiffs.

Occidental and Texas Brine removed this action to the United States District Court for the Eastern District of Louisiana, pursuant to 28 U.S.C. §§ 1441 and 1446, alleging diversity of citizenship and the improper joinder of six other defendants alleged to be Louisiana citizens. (R. Vol. 1, p. 000101). Leave to amend was granted to join the Hawthorne Family Class Trust as party plaintiff shortly after institution of this action; however, no attempt was made to

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1. The Hawthornes improperly joined several non-diverse defendants in this action solely for the purpose of defeating diversity jurisdiction. Claims against three of the six defendants were dismissed either voluntarily by plaintiffs, or by operation of law. (R. Vol. 1, p 69, Motion to Dismiss Woodson Construction Company; R. Vol. 5, p. 001146, Motion to Dismiss Paul Lane d/b/a Paul Lane Construction Co., and R. Vol . 5, p. 000982, Motion to Dismiss Marsh Buggage Equipment).

The Hawthornes first Motion to Remand was denied because the non-diverse defendants, in particular Cain's Hydrostatic Testing, Inc. ("Cain's") and Diamond Fabricators, Inc. ("Diamond"), had been improperly joined, as the allegations in the petition established there was no possibility of recovery against these non-diverse defendants under state law. No facts had been alleged to support the tort claims that the services rendered by these non-diverse defendants had been negligently performed or resulted in harm. Furthermore, in piercing the pleadings and conducting a summary inquiry, the district court found the joinder of these non-diverse defendants was improper because neither was an excavation contractor, as alleged, and neither had any involvement with any alleged subsequent leaks or re-leaks, as claimed.

join the other co-owner, Nire, Inc., in this amendment. A Motion to Remand was denied, however.[2]

No attempt was made to join the other co-owner, Nire, for more than one year after the proceeding had been instituted. Nire's joinder was eventually sought as plaintiff. A corresponding Motion to Remand was also urged alleging Nire's joinder would destroy diversity. Before these motions were heard, Nire settled any and all potential claims with defendants; thus, it had no claim to assert as a plaintiff and its joinder as such would have been futile. As a result, joinder was denied.

In a last-ditch effort to defeat diversity, The Hawthornes moved to have Nire joined as a defendant, urging that as a result of the settlement, Nire should now be aligned with defendants, since Nire's consent to their remediation and restoration plans for the property was refused. They further urged a cause of action under Louisiana Civil Code arts. 800 and 806, asserting they had a right of reimbursement against Nire for the costs of implementing their plans for the property.

The district court refused to grant leave to file this amendment, noting that the claim for reimbursement was premature under Louisiana Civil Code arts. 800 and 806 as no reimbursable expenses had allegedly been incurred. The district court held settling its claims did not necessitate Nire's joinder as a defendant in this action. Thus, the district court

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2. The district court granted a Motion for Summary Judgment/ Motion to Dismiss Tassin International Ltd. and Diamond Fabricators, Inc. (R. Vol. 10, p. 002413), and it also granted an unopposed Motion for Summary Judgment dismissing Cain's Hydrostatic Testing. (R. Vol. 7, p. 001472); these dismissals are not before this Court.

denied The Hawthornes' Motion for Leave to Supplement and Amend their Petition to join Nire as a defendant and the matter proceeded on the merits with the existing parties before the court.

Subsequently, Occidental and Texas Brine sought summary dismissal on the merits, based on prescription. Occidental and Texas Brine offered a Statement of Thirty-Eight Undisputed Facts, supported by affidavits, depositions, answers to interrogatories and admissions that proved The Hawthornes had constructive, if not actual, knowledge of their cause of action more than ten years before institution of the action.

The pipeline leaks in question occurred between 1985 and 1987, but this action was not filed until 2001. The Hawthornes alleged they had no knowledge of these leaks until October 24, 2000, claiming prescription had been suspended until then; however, in opposing the motion for summary judgment, they produced no evidence to support this date of first knowledge. Instead, The Hawthornes submitted affidavits from two of the same witnesses whose affidavits had been offered by Occidental and Texas Brine and used to support the Motion for Summary Judgment in an attempt to *manufacture* issues of fact. These second affidavits did not contradict the genuine material facts, and the lower court concluded, even considering those second affidavits, Occidental and Texas Brine nevertheless established that Petitioners had constructive notice of their claims years before the alleged date of discovery, October 24, 2000, but failed to take action on that knowledge for 13 years, and they had failed to meet their burden of proving that prescription had been suspended or interrupted. Occidental and Texas Brine, on the other hand, had

affirmatively proved that the claims had prescribed. The district court granted Occidental and Texas Brine's Motion for Summary Judgment and dismissed The Hawthornes claims as prescribed. *Hawthorne Land Company v. Occidental Chemical Corp.*, 2004 WL 45524 (E.D. La. 01/06/04). The U. S. Fifth Circuit Court of Appeals affirmed the rulings of the district court *per curiam*, which dismissed this matter on a motion for summary judgment based on prescription, and denied a petition for rehearing. *Hawthorne Land Co. v. Occidental Chemical Corporation*, 2004WL 30137 (5th Cir. 11/15/05); 431 F.3d 221.

REASONS FOR DENYING THE PETITION

Petitioners' request for review is simply based on the U.S. Fifth Circuit Court of Appeals alleged misapplication of the law of joinder and alleged erroneous factual findings affirming the district court's grant of a motion for summary judgment that dismissed this action as prescribed. The lower courts properly applied the law and made no error in their factual findings. The decisions below do not conflict with a decision of this Court or any court of appeals on these issues. No constitutional or federal questions are presented to this Court in this petition. Thus, there is no need for the Court to exercise its discretionary jurisdiction, and the petition should be denied.

A. The Federal Circuit's Decision Properly Applied the Law Governing Amendment, Joinder and Remand.

The supervisory jurisdiction of this Court is not warranted to review the denial of a motion to amend. The issue before the lower courts was whether they should grant an amendment that was only sought in order to add a co-

owner of immovable property as an involuntary plaintiff or a defendant to an action for damage to the property, when that co-owner had settled with defendants its potential claim for damage to the property, and when the joinder of that co-owner would tend to defeat diversity. The lower courts rightfully rejected the motion to amend which sought the joinder of this non-diverse party and the motion to remand.

Joinder of Nire Was Unnecessary for a Just Adjudication.

The U.S. Fifth Circuit Court of Appeals properly utilized an abuse of discretion standard in reviewing the decision of the district court which denied the motions to amend to join a non-diverse party who had settled its claim against the defendants. *Quintanilla v. Texas Television, Inc.*, 139 F.3d 494, 499 (5th Cir. 1998). When an amendment would be futile, it is appropriate to deny it. *Avatar Exploration, Inc. v. Chevron USA, Inc.*, 933 F.2d 314, 321 (5th Cir. 1991). Under the circumstances, there was no abuse of discretion in refusing to allow the amendment seeking joinder of Nire.

The Hawthornes are seeking damages from Occidental and Texas Brine for *inter alia* the trespass of brine solution into their property. The Hawthornes have asserted the lower courts erred by proceeding in this matter without Nire's joinder, since Nire is a co-owner of the property. Nire is a 5% co-owner of the property, along with The Hawthornes who jointly own the remaining 95% of the subject property.[3]

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3. The only form of co-ownership recognized by Louisiana law is co-ownership in division, which presumes equal shares of ownership among the co-owners, unless provided for by law or other juridical act. *See* La. Civ Code Ann. art. 797 (West, 2006); *See also* La. Civ. Code Ann. art 480 (West, 2006).

Co-ownership in Louisiana is a form of individual proprietorship in which each co-proprietor has a complete and absolute right to an abstract portion of the entire thing held in common; thus a co-owner owns the entire property with his co-owners, but may freely use the property for any purpose for which it is intended, so long as he does not interfere with the right of the other co-owners to the same enjoyment. *See Gravois, The Revision of The Louisiana Co-Ownership Law*, 65 Tul. L. Rev. 1261, 1262 (May, 1991). More importantly for purposes of this action, as against third persons, a co-owner has the right to use and enjoy the thing as if he were the sole owner. LA. CIV. CODE ANN. art. 802 (West 2006). "For example, a co-owner alone may take all the necessary steps for the preservation of the property, including the institution of suits against trespassers or usurpers." *See* Comment, LA. CIV. CODE ANN. art. 802 (West 2006).

While Petitioners have asserted that the lower courts ignored the elephant in the room, in fact, it is Petitioners who proceeded with blinders in the lower courts in their efforts to defeat diversity and have this matter adjudicated in state court. Petitioners have persistently ignored the fact that the same provision which they cite in support of Nire's joinder and in affording them a cause of action for reimbursement against Nire, Louisiana Civil Code article 802, also allows them (The Hawthornes) to proceed in an action for trespass against third parties without the joinder of all co-owners.

In the district court, The Hawthornes twice tried to amend seeking only to join Nire, first as an involuntary plaintiff in their second motion to amend, then after Nire's settlement,

as a defendant in their fourth motion to amend.[4] Incredibly, instead of dismissing their amendment which sought to join Nire as a party plaintiff as moot, upon learning of Nire's settlement, The Hawthornes persisted in seeking Nire's joinder, demonstrating the extent to which The Hawthornes would go in order to attempt to manipulate the jurisdiction of the court. Undeterred by the facts and the law, The Hawthornes conjured up an argument that as a result of the settlement, Nire was now aligned with the defendants and, further, Nire should be joined as a defendant in order for them to obtain complete relief, which would include payment by Nire of its portion of the costs of restoration and remediation of the subject property that they hoped would be awarded at the conclusion of this litigation.

The lower courts rejected this transparent argument, finding joinder of Nire was moot since it had settled and the law upon which they had based their claim for reimbursement was inapplicable since The Hawthornes had not expended any funds to be reimbursed. The district court refused to grant leave to amend to join Nire, and instead, permitted the matter to proceed on the merits with the parties before the court.

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4. The Fifth Circuit's opinion properly noted that The Hawthornes did not distinguish between these two attempts to amend to join Nire, although they are different and entail different analyses.

The Proposed Amendment To Join Nire Was Properly Subjected To a Heightened Scrutiny, Since The Proposed Amendment Would Have Destroyed Diversity.

The granting of leave to file a post-removal amendment that would tend to defeat diversity is within the district court's discretion and such a proposed amendment is scrutinized more closely than an ordinary amendment. 28 U.S.C. § 1447(e). *See*, *Hensgens v. Deere*, 833 F.2d 1179, 1182 (5th Cir. 1987), *appeal after remand*, 869 F.2d 879 (5th Cir. 1989), *reh'g denied*, 875 F.2d 858 (5th Cir. 1989), *cert. denied*, 493 U.S. 851 (1989). Both of the Hawthornes' motions to amend were filed post-removal and were filed in conjunction with a motion to remand alleging Nire's joinder would defeat diversity. Accordingly, both motions fall squarely within the framework of a *Hensgens* analysis. The first factor that the district court must consider when faced with such a proposed amendment is to determine whether the party seeking leave to amend has been dilatory in asking for the amendment. *Hensgens*, *supra*. The Fifth Circuit held that:

> The denial of leave to amend is not an abuse of discretion if there had been 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amend, [or] futility of the amendment.'

Riley Stoker Corp. v. Fidelity Guaranty Ins. Underwriters, Inc., 26 F.3d 581, 591-592 (5th Cir. 1994), citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962).

Petitioners raised a smokescreen claiming Occidental and Texas Brine were attempting to manipulate the district court's jurisdiction by settling with Nire in an effort to prevent its joinder after the Motion to Amend seeking Nire's joinder had been filed. Surely at the time of institution of this action in 2001, HLC knew that it owned the subject property in indivision with two others, yet joinder of these two co-owners was not even sought until prompted by the defendants' answer which raised non-joinder some six months after filing this action. HLC did not seek to amend to add Nire when it sought leave to amend to join its other co-owner, The Hawthorne Family Class Trust, claiming Nire refused to join as plaintiff, and it did not seek then to join Nire as an involuntary plaintiff. Instead, HLC delayed any attempt to amend to join Nire for another six months, nearly one year after institution of the action, and only did so *after* it had tried unsuccessfully to have the matter remanded.

Suggestions that Occidental and Texas Brine attempted to manipulate the jurisdiction of the court by settling with Nire are incredulous, especially given the timing of the amendments seeking to joining Nire and the circular arguments offered to the lower courts by The Hawthornes in favor of Nire's joinder. Nire had no interest in being a participant in this litigation, and thus, it is not beyond the realm of reasonableness for Nire to agree to a monetary release of their claims.

Complete relief available without joinder

Assuming The Hawthornes had expended monies (which they had not) to have their proposed remediation plan for the property performed, then pursuant to Louisiana Civil Code articles 800, 806 and arguably 804, they would have a right of action to seek reimbursement. Article 800 allows a

co-owner to take steps to preserve a thing without the concurrence of a co-owner. LA. CIV. CODE ANN. art. 800 (West, 2006). Expenses for maintenance and management of a thing held indivision are reimburseable, pursuant to article 806. LA. CIV. CODE ANN. art. 806 (West, 2006). The Hawthorne's proposed remediation and restoration plan for the property tends to fall within the ambit of Louisiana Civil Code article 804, governing substantial alterations and improvements, which provides when such acts are undertaken with consent of the co-owner, the rights of the parties are governed by Louisiana Civil Code article 496. And, if the proposed repairs had been done without Nire's consent, then article 497 governs; it allows for reimbursement of either the increased value of the thing or payment of the improvements if done in good faith, or the right to demand removal and demolition plus damage to the immovable, if done in bad faith. LA. CIV. CODE ANN. art. 804 (West, 1990). Either way, Nire's joinder is not necessary.

The lower courts agreed that joinder of Nire as a defendant was not necessary to afford the parties complete relief. *Hawthorne Land v. Occidental Chemical Corp.* 431 F.3d 221, 226 (5th Cir. 2006). Nire's settlement with the defendants did not affect any potential recovery by plaintiffs, which would remain at 95%. The Hawthornes argument for reimbursement from Nire under Louisiana Civil Code article 800 for expenses incurred in the maintenance of the property was rejected as both speculative and premature. *Id.* The Fifth Circuit recognized that while The Hawthornes might have had a declaratory relief claim against Nire for contributing to the costs of related to the land if necessary, "such a claim (is) so tangential to the main issue in the case (it) is insufficient to make a party necessary under Rule 19." *Id.* at 226-227.

In citing to *Miller v. Seven Seas Properties, LLC*, 800 So. 2d 406 (La. App 3 Cir. 11/21/01), *writ denied*, 811 So. 2d 878 (La. 3/8/02), The Hawthornes overlooked the fact *Miller, supra*, was brought as a declaratory judgment action between co-owners of immovable property seeking the reimbursement of monies already expended for what one co-owner had deemed were necessary expenses. Pet. at 8. The other co-owner defendant in *Miller* denied the necessity of the proposed repairs; but the court found there was a sufficient justiciable controversy between the parties to this declaratory action to allow it to proceed. Here, no such controversy is in contention since there had been no expense incurred to be declared reimburseable, and as properly noted by the Fifth Circuit, there is no evidence that Nire has refused to contribute to the cost related to the land, if necessary. *Hawthorne Land*, 431 F.3d at 226. And, the Fifth Circuit observed regardless of the settlement amount, the possibility exists for Nire not contributing toward the reclamation of the property. *Id.* at n.9.

Likewise, the other two cases cited by The Hawthornes, *Johnco v. Jameson Interests*, 741 So. 2d 867 (La. App. 3 Cir 6/23/99) *writ denied* 750 So. 2d 183 (La. 11/5/99), and *Broussard v. Columbia Gulf Transmission Co.*, 398 F.2d 885 (5th Cir. 1968), are also distinguishable. Pet. at 10, 11. In *Johnco, supra*, the parties were not co-owners of the property, despite their co-ownership of the property's mineral rights, since they owned separate parcels of the property in question. *Broussard, supra*, did not involve an attempt to amend to "add" a party post-removal. Nire's joinder was not only sought post-removal to assert a claim for damages to the property, but after Nire had released any and all potential claims for these damages against the Defendants, with prejudice.

The second *Hensgens, supra* criteria requires the district court to consider whether any significant injury or prejudice would result from denial of the amendment. Nire settled its claim, so there could be no injury in denying the amendment which sought to join Nire as a plaintiff, as the lower courts determined; joinder in such an instance would have been futile. *Riley Stoker, supra.*

After this poorly veiled attempt to defeat diversity was given the full scrutiny warranted under *Hensgen, supra*, the district court rejected this argument and refused to allow this latest amendment. In reaching this conclusion, the lower court observed the co-owner's settlement had eliminated the need to be joined as a party plaintiff and the Hawthornes would be entitled to their full relief from the defendants without the joinder of their co-owner. The Hawthornes' cause of action against their co-owner was one for reimbursement, and in this case there had been no expenses incurred; thus, that claim was speculative. Accordingly, the magistrate and the district court appropriately determined that the Nire was not a necessary party to this proceeding in any capacity. The Fifth Circuit saw through the argument as well, commenting, "the manifest purpose of the plaintiffs' actions was to defeat federal jurisdiction". *Hawthorne Land* 431 F.3d at 227.

Rule 19 of the Federal Rules of Civil Procedure governs the joinder of persons in a lawsuit in order for a fair decision to result. FED. R. CIV. PROC. 19. This rule provides guidance to the court for the joinder of parties who will not deprive the court of jurisdiction, if the party's joinder is necessary for a just adjudication and factors for consideration if the joinder is not feasible. *Id.* Rule 19(b) also gives the district court the discretion to determine whether to proceed with an action lacking a necessary party. A court must consider the

prejudice of proceeding with the parties present lacking the necessary party's presence and the prejudicial effect it may have on the outcome of the proceedings. After considering such, it determines if the matter can proceed absent the necessary party, or it can dismiss the action entirely. The lower courts carefully evaluated each of the considerations set forth in Rule 19, then allowed the matter to proceed without Nire whose joinder was not feasible.

For Petitioners to contend that Nire should have been made a defendant simply because it had settled any claims it may have had with respect to this alleged property damage is ridiculous. The Hawthornes' attempt to join Nire as a defendant is no different than HLC seeking to name Hawthorne Family Class Trust as a defendant on the anticipatory basis that at some future point in time the Hawthorne Family Class Trust might not pay its proportionate share of any expenses allegedly owed under articles 800 and 806.

In urging the necessity of Nire's joinder, Petitioners have ignored key distinctions between their claim against the co-owner of this property and those asserted in law and the jurisprudence that they cite in support of their position that they somehow would not be able to obtain complete relief absent Nire's joinder as a defendant. Pet. at 9. Louisiana Civil Code article 806 provides a right of action for reimbursement to a co-owner who incurs necessary expenses for the maintenance or repair of property owned in indivision. Petitioners do own the property in indivision with the settling co-owner, but they have not spent a single cent remediating this property.

The Hawthornes were dilatory in seeking the fourth post-removal amendment which sought joinder of Nire as a defendant, based on the same key facts and issues as had been previously considered by the lower court and rejected in their second motion to amend. The circuit court commented that "the plaintiffs have not demonstrated why this legal theory (offered in seeking the fourth post-removal amendment) was not available (during the second motion) or why it could not have been anticipated at that time," relying on the factors set forth in *S&W Enterprises, LLC v. Southtrust Bank of Alabama, NA*, 315 F.3d 533, 536 (5th Cir. 2003) and Fed. R. Civ. Proc. Rule 16(b). *Hawthorne* Land, at 431 F.3d at 228. The decision to not allow the amendment seeking to add a new, non-diverse defendant in a declaratory judgment action, two months before trial on the merits of a matter that had proceeded in the federal forum for more than two years, was not an abuse of discretion. *See Hensgens, supra*; *Riley Stoker, supra.* For these reasons, granting a writ of certiorari to review the decision of the lower courts denying the motion for leave to amend to join Nire does not justify further review of this Court.

B. The Federal Circuit Properly Read and Applied the Law Applicable to the Granting of the Motion for Summary Judgment Based on Prescription.

It is well-established that the party pleading prescription bears the burden of proof, but once it is shown that more than a year has elapsed between the tortious conduct and the filing of the tort suit, the burden then *shifts* to the plaintiff to prove interruption, suspension or some other exception to prescription, such as *contra non valentem* or the theory of continuing tort. *Terrebonne Parish School Board v. Mobil Oil Corp.*, 310 F.3d 870, 877 (5th Cir. 2002); *In re Moses*,

788 So. 2d 1173 (La. 5/25/01). Clearly more than one year has elapsed between the time of the alleged tortious conduct in 1985-1987 and the institution of this action in February, 2001. The Louisiana Supreme Court recognized in *Moses, supra*, when the face of the petition reveals that the plaintiff's claim has prescribed, the burden shifts to the plaintiff to demonstrate prescription was suspended or interrupted:

> Given the procedural posture of this case, we resolve the issue of the placement of the burden of proof based on a logical application of the general principle that the party asserting a suspension or interruption of prescription bears the burden. Since the party asserting a suspension is plaintiff, logic dictates that plaintiff will have the burden of proof.

Id. at 1177-78. It was undisputed that the state court Petition alleged the tortious conduct occurred more than one year prior to institution of this action; thus, the burden of proving interruption or suspension of prescription was on The Hawthornes. *Mobil Oil, supra; Moses, supra.*

In an attempt to revive this prescribed claim, The Hawthornes alleged in their initial pleading that they had no knowledge of these leaks until October 24, 2000. (R. Vol. 28, p. 007277, para. 81). As the party asserting suspension or interruption of prescription, The Hawthornes had the burden of proof with regard to overcoming the *prima facie* defense. *Mobil Oil, supra* at 877. Their unsupported statement of lack of knowledge until this date failed to meet their burden and neither *contra non valentem*, nor reliance on the continuing tort theory could save this claim from dismissal as prescribed.

In moving for a summary judgment in this matter, Occidental and Texas Brine's Motion for Summary Judgment Based on Prescription of both the tort and alleged contract claims was supported with a host of evidence, including affidavits from two former property managers for the Trustee. Affidavits and deposition testimony of numerous other witnesses who were intimately involved in the management of the property, along with The Hawthornes' own discovery responses, were also offered in support of the Statement of Undisputed Facts to prove The Hawthornes had at the very least constructive knowledge, if not actual knowledge, more than 10 years prior to either the date of filing of this claim or well before the claimed date of discovery, October 24, 2000. The burden then shifted to The Hawthornes to somehow prove an interruption or suspension of the running of prescription until October 24, 2000. None of the evidence offered in opposing the defendants' Motion for Summary Judgment Based on Prescription established this date, October 24, 2000, as the date of first knowledge of the claim; in fact, no evidence offered even mentioned this date. Simply, the Hawthornes failed to carry this burden - the motion for summary judgment was granted, and rightly so.

Summary judgment is proper if, after taking all inferences most favorable to the non-moving party, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Arguello v. Conoco, Inc.*, 207 F.3d 803, 807 (5th Cir. 2000), *cert. denied, Escobedo v. Conoco, Inc.* 531 U.S. 814, 121 S. Ct. 177, 148 L. Ed. 2d 121, 69 USLW 3086 (U.S. Oct. 2, 2002) No. 00-55). The circuit court properly reviewed the grant of summary judgment *de novo*, applying the same standard as the district court. *Arguello, supra*; *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 173 (5th

Cir. 2000). The Fifth Circuit's *de novo* review of the record revealed that there was no genuine issue of material fact that the Petitioners' had at least constructive notice of their claim long before they instituted this proceeding, and a 13 year delay in proceeding was unreasonable; thus it determined the matter was prescribed. *Hawthorne Land Company v. Occidental Chemical Corp.*, 2004 WL 30137 (5th Cir. 11/15/05) 431 F.3d 221. Accordingly, no compelling reason exists for this Court's review of the Fifth Circuit's opinion.

The Hawthornes failed to carry their burden in opposing the motion for summary judgment to prove that prescription on this 13 year old claim had been interrupted or otherwise suspended until October 24, 2000, as alleged.

This action was filed in February, 2001, for damage due to leaks that allegedly occurred between in 1985 and 1987. (R. Vol. 28, p. 007257). Ordinary delictual actions are subject to a liberative prescription period of one year from the date the damage is sustained. La. Civ. Code Ann. art. 3492 (West, 2006). But, in the case of damage to immovable property, the one year prescriptive period commences to run from the day the owner of the immovable acquired or should have acquired knowledge of the damage. La. Civ. Code Ann. art. 3493 (West, 2006).

Clearly more than one year has elapsed between the time of the leaks, the alleged tortious conduct, which occurred in 1985-1987, and the commencement of this action in February, 2001. The Hawthornes alleged that they did not acquire knowledge of the damage until October, 2000, in an attempt to suspend the running of prescription. As the party asserting suspension or interruption of prescription, The Hawthornes

had the burden of proof with regard to overcoming the *prima facie* defense. *Mobil Oil, supra* at 877. In opposing the motion for summary judgment, the lower courts only had The Hawthornes' unsupported statement of lack of knowledge until this October 24, 2000 date. Simply put, The Hawthornes just failed to meet their burden.

Prescription is deemed to begin running when it can be objectively determined that in the exercise of reasonable diligence, a *reasonably* minded plaintiff would have been aware of the possibility that his damages could have been caused by another. *See, e.g., Cordova v. Hartford Accident & Indemnity Company*, 387 So. 2d 574, 577 (La. 1980); *Jordan v. Employee Transfer Corp.*, 509 So. 2d 420, 423 (La. 1987). The Hawthornes' reliance on *contra non valentem* to interrupt prescription was misplaced, as this doctrine recognizes the judicial exception to the statutory rule of prescription only in limited circumstances and extends up to "the time the plaintiff has actual or constructive knowledge of the tortious act." *Bergeron v. Pan American Assurance Co.*, 731 So. 2d 1037, 1042 (La. App. 4 Cir. 1999). The focus under the doctrine of *contra non valentem* is not on what did the defendants do, but at what point in time did the plaintiff have sufficient information to excite attention and prompt further inquiry. *Id.*; *McGreggor v. Louisiana State University Bd. of Supv'rs*, 3 F.3d 850, 865 (5th Cir. 1993); *see also Eldredge v. Martin Marietta Corp.*, 207 F.3d 737 (5th Cir. 2000); *Curtis v. City of New Orleans*, 2000 WL557399 (E.D. La.) As a judicial exception to the statutory rule of prescription, Louisiana courts strictly construe this doctrine and only extend its benefits up to "the time that the plaintiff has actual or constructive knowledge of the tortious act." *Eldredge*, 207 F.3d at 743.

The Hawthornes did not file this claim until 2001, for damages from pipeline leaks occurring between 1985-1987. Thus, the critical question to be determined is, was it reasonable for these plaintiffs to take no further action in defense of their property rights for 13 years in the face of actual or constructive knowledge that this pipeline had not only leaked, but that a 2-1/2 mile section of this brine pipeline that traverses their property had to be replaced due to leaks?

In determining the reasonableness of the plaintiffs' inaction, this Court has recognized that "[t]he educational status and mental sophistication" of a plaintiff is relevant to assessing whether a plaintiff acts reasonably in delaying the filing of a tort action." *See, e.g., Ducre v. Mine Safety Appliances*, 963 F.2d 757, 761 (5th Cir. 1992); *Knaps v. B & B Chemical Co.*, 828 F.2d 1138 (5th Cir. 1987). The Hawthornes relied on land management professionals to manage the property and advise them; in fact, both HLC and the Trust had an agency relationship with Bank One Trust Company, NA to manage the property. The knowledge of these professionals is imputed to the owners. Constructive notice, as well as actual knowledge, imputed to an officer or agent of a corporation, is binding on the corporation. *See Martin v. Schwing Lumber & Shingle Co.*, 81 So. 2d 852 (La. 1955); *Nat'l Park Bank v. Concordia Land & Timber Company*, 105 So. 234 (La. 1925); *Coryell v. Phipps*, 317 U.S. 406, 63 S. Ct. 291, 87 L. Ed. 363 (1943).

To the extent that the presence of brine caused "damage" to The Hawthornes' property, (which is denied), a reasonably diligent landowner should have known of the events complained of in their state court Petition. Occidental and Texas Brine came forward with more than sufficient evidence to show that The Hawthornes had actual knowledge of

pipeline leaks on the property 10 years before this action was instituted, yet failed to take any further action based on this knowledge. Such inaction was unreasonable. There were various repairs to the pipeline performed on the Trust Property, including the replacement of entire sections of the pipeline on the Trust Property. All of the owners were aware of the repairs made to the leaking pipeline, including the replacement of a section of pipeline. In addition, there were the observations and communications by and between the owners, their agents, attorneys, trust administrators, property managers, officers, lessees and managerial employees about the leaks and these repair activities.

The evidence in this record demonstrates that The Hawthornes were aware of the servitude grant for the pipeline, and they also knew of the replacement of that pipeline, and yet still they persist in arguing there was no evidence that they had knowledge of their damage from the pipeline leaks for 13 years. The Louisiana Supreme Court made clear in *Guitreau v. Kucharchuk*, 763 So. 2d 575, 576 (La. 2000), "ignorance of the probable extent of injuries materially differs from ignorance of actual harm, which delays commencement of prescription." Occidental and Texas Brine proved, without question, that brine pipeline leaks and resulting damages were both "knowable" and "known" to The Hawthornes, by virtue of communications with the property managers and the Hawthornes' attorney who investigated the reports of leaks and made claims in response, and from numerous other sources. *See, e.g., Derrick v. Yamaha Power Sports*, 850 So. 2d 829 (La. App. 5th Cir. 1993) (cause of action became reasonably knowable at the time legal counsel was sought). Occidental and Texas Brine submitted affidavits and/or deposition testimony from many of the property managers and trust officers of Bank One who

were involved with the day-to-day management of this property, as well as answers from The Hawthornes to interrogatories in which these witnesses had been identified. In response to an interrogatory as to when it first became aware of each incident and/or leak that damaged the property, The Hawthornes identified attorney, Taylor Caffery, as its source of information. (R. Vol. 20, p. 005225-005228). In response to interrogatories propounded by Texas Brine, HLC identified Cliff LeBlanc, a property manager and several Bank One employees who were property managers or who were involved in the management of the property over the years, Peggy Scott, Cliff LeBlanc, John Cannizaro, R. Mike Lansford and Chris Fatzer, as persons who would have full knowledge of the leaks, damage and extent thereof in the late 1980's (R. Vol. 20, p. 005223-005224).

Thus, whether the district court incorrectly believed that Caffery represented both HLC and The Trust is of no moment, because it found two other witnesses, Peggy Scott and Cliff LeBlanc, in their capacities as property managers had a "duty to assess the risks of the various enterprises; and inspect the property, for further action or whether more intensive investigation was required." (R. Vol. 40, 10687-91). *See, e.g., Blackwell v. Bossier Parish School Board*, 747 So. 2d 1248 (La. App. 2d Cir. 1999) (Property owners have a duty to inspect their property and to discover defects). At the very least, The Hawthornes inaction in not pursuing their claim until some thirteen years after obtaining constructive knowledge was not reasonable. *See In Re: Medical Review Panel of Howard*, 573 So. 2d 472, 474 (La. 1991) (Prescription does not run against one who is ignorant of the facts upon which his cause of action is based, as long as such ignorance is not willful, negligent or unreasonable). And consequently, the district court properly determined that The

Hawthornes, despite being advised on numerous occasions of leaks on their property from the Oxy-Taft pipeline, by various sources, including their own lessee, agents, attorney, employees, etc., as well as of the resulting damage, did absolutely nothing to assert their claim for some 13 years. This was unreasonable. *Hawthorne Land*, 2004 WL 45524.

Although the Hawthornes claimed to have had no knowledge of the subject leaks until October 24, 2000, not once in their opposition did they offer the district court any explanation as to what occurred on this date to trigger the running of prescription, which they claim had been in suspension since the mid-1980s due to their lack of knowledge. Not one shred of evidence was offered to show that prescription began to run on this date, as opposed to any date before October 24, 2000.

In an attempt to "create" an issue of fact, The Hawthornes relied on a second set of affidavits from two of the same witnesses whose original affidavits were offered in support of the Motion by Occidental and Texas Brine. Despite their intent, these affidavits failed to establish the existence of genuine issues of "material fact", that The Hawthornes did not have at least constructive knowledge of their claim at least 10 years before one year of filing this action. The second set of affidavits did not provide any explanation as to why they were necessary, nor did they contradict the original affidavits regarding any material issues of genuine fact for their necessity. *See Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223 (5th Cir. 1984); *Copeland v. Wasserstein, Perella & Co.*, 278 F.3d 472 (5th Cir. 2002). The Hawthornes argued to the Fifth Circuit that these witnesses, Peggy Scott and Cliff LeBlanc were "provided only a limited set of historical documents by defendants when their initial affidavits were

obtained," but "were not provided all of the pertinent documents produced by Bank One in discovery that would have refreshed their memory on the subject." *See* Appellants' Brief, p. 30; but these explanations were those of counsel; not the affiants. Neither affiant offered any such explanation in their affidavit, nor did they reference or even acknowledge any of the documents, which counsel (not the affiants), attached to their second affidavits offered by The Hawthornes in opposition to the motion for summary judgment, as required by Fed. R. Civ. Proc. 56 (e). (R. Vol. 28, p. 007266; R. Vol. 34, p. 008892).

Petitioners argue that both lower courts failed to view all inferences in their favor as the non-moving party, noting that these second affidavits from Scott and LeBlanc contradicted statements made in the affidavits of these same witnesses offered in support of the motion for summary judgment. Pet. at 15. The district court concluded that "regardless of the admissibility of the second affidavits from Scott and LeBlanc, their constructive knowledge of the leaks is indisputable." *Hawthorne Land Company v. Occidental Chemical Corp.*, 2004 WL 45524 (01/06/04), p. 2. After conducting a *de novo* review of the record and considering all of the evidence in a light most favorable to the non-moving party, the district court determined that The Hawthornes had not demonstrated the existence of genuine issues of material fact warranting the trial of this matter.

The Fifth Circuit affirmed the grant of the motion for summary judgment, noting in particular, "Like the district court, we do not decide whether the affidavits should be considered because we affirm that court's judgment that even if they are considered, summary judgment for the defendants is proper." *Hawthorne Land Company v. Occidental*, 2004

WL30137 (5th Cir. 11/15/05), 431 F.3d 221, 228 n.20. This statement reflects that both the district court and the Fifth Circuit determined that the statements made by these two witnesses in their second affidavits were not conflicting on material issues of fact. Despite the attempt to manufacture a conflict by submitting the second set of affidavits, the lower courts concluded even considering these affidavits, the grant of the motion for summary judgment was appropriate as this matter had prescribed. *Id.*

The Grant of a Motion for Summary Judgment also properly dismissed the Contract Claim as prescribed, although it is denied, The Hawthornes even had such a claim.

The 1965 Right-of-Way grant between the ancestors in title of The Hawthornes and Nire is the only possible basis for claiming a contract claim in this matter. (R. Vol. 28, pp. 007359-007365). This Right of Way agreement allowed for the installation, operation and repair of the pipeline; however, this Right of Way grant is silent on any obligation to remediate or restore the Trust property in event of any damage to the Trust property as a result of the operation of the pipeline. Thus, Occidental and Texas Brine dispute that there ever existed a contract claim in this matter. However, even if The Hawthornes had a contract claim, it has prescribed. The prescriptive period applicable to an action alleging breach of contract is ten (10) years from the date of breach. LA. CIV. CODE ANN. art. 3499 (West, 2006). In the instant matter, the alleged breach of contract occurred more than ten years before this suit was filed in February, 2001; thus, any contract claim is likewise prescribed.

For these reasons, the decision of the U. S. Fifth Circuit Court of Appeal to affirm the dismissal of this action pursuant to Occidental and Texas Brine's Motion for Summary Judgment Based on Prescription was proper. Petitioners' assignment of error does not justify further review by this Court.

CONCLUSION

For the foregoing reasons, Respondents, Occidental Chemical Corporation and Texas Brine Company, LLC., request that the Petition for Writ of Certiorari of Petitioners, Hawthorne Land Company and The Hawthorne A. Hawthorne Family Class Trust, Bank One Trust Company, N.A., Trustee, be denied.

Respectfully submitted,

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